

ADAMS, J.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

TODD A. SHELTON,)	CASE NO. 5:08CV3008
)	
Plaintiff,)	
)	JUDGE JOHN R. ADAMS
v.)	
)	<u>ORDER</u>
OHIO EDISON CO.,)	
)	
Defendant.)	

This action is before the Court upon plaintiff Shelton's Notice of Withdrawal (Doc. 32) of the third cause of action in the complaint. The notice states that Shelton seeks to withdraw that claim without prejudice.

When a party seeks to voluntarily dismiss some, rather than all, of the claims in a multi-count complaint, Fed. R. Civ. P. 41(a) does not apply. Rather, a court should consider the motion to be a request for leave to amend under Fed. R. Civ. P. 15. 3 *Moore's Federal Practice and Procedure* § 15.12[4]; *Loutfy v. R.R. Donnelley & Sons, Co.*, 148 F.R.D. 599 (N.D. Ill. 1993) (motion to voluntarily dismiss the federal claim was treated as a motion to amend and granted as such, and the state claims were remanded to state court where the case had first been filed).¹ Accordingly,

¹ However, under Rule 41(a), an abuse of discretion is found only where a defendant would suffer some plain legal prejudice as a result of a dismissal without prejudice, as opposed to the mere prospect of a second lawsuit. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947); *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994). When determining that plain legal prejudice, this Court will "consider such factors as the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant." *Id.*

The Court will treat Shelton's Notice of Withdrawal of Third Cause of Action (Doc. 32) as a Motion for Leave to File an Amended Complaint. If Shelton does not file an Amended Complaint **with the consent** of Ohio Edison on or before May 27, 2009, Ohio Edison shall file a memorandum in opposition to the request for leave to amend on or before May 29, 2009.

IT IS SO ORDERED.

May 22, 2009
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge